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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

THE STATE OF COLORADO,
Petitioner,
vs.
JOHN HARVEY GASKINS,
Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the Colorado Supreme Court
Case No. 90SC437

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QUESTION PRESENTED FOR REVIEW

Important questions remain unanswered after *Rummel v. Estelle* (1980), *Solem v. Helm* (1983), and *Harmelin v. Michigan* (1991), about eighth amendment proportionality reviews of life sentences imposed under state recidivist schemes.

The question presented is:

I. Does the eighth amendment require a full proportionality review of a mandatory life sentence, imposed for a defendant's **fourth** felony conviction,

A. when the defendant's convictions, which include a violent offense, were all for crimes traditionally classifiable and punishable as felonies, and

B. when his life sentence contains the possibility of parole?

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OPINION BELOW

Colorado seeks certiorari review of a case decided by the Colorado Supreme Court. In *People v. Gaskins*, 825 P.2d 30 (Colo. 1992), the Colorado Supreme Court decided whether a full proportionality review of a life sentence was required under the Cruel and Unusual Punishments Clause of the Eighth Amendment of the United States Constitution. The Colorado Supreme Court affirmed the ruling of the Colorado Court of Appeals, which had remanded the case to the trial court for a full proportionality review.

The unpublished opinion of the Colorado Court of Appeals, *People v. Gaskins*, No. 88CA159 (Colo. App. May 17, 1990) is included as Appendix A. The opinion of the Colorado Supreme Court, *People v. Gaskins*, 825 P.2d 30 (Colo. 1992), is included as Appendix B. The Colorado Supreme Court's order of

February 3, 1992, denying Colorado's petition for rehearing, is included as Appendix C.

JURISDICTION

Jurisdiction is invoked pursuant to 28 U.S.C. § 1257 (1988).

A. Finality.

The Colorado Supreme Court affirmed the Colorado Court of Appeals' remand of this case to the trial court for a full proportionality hearing. This is a final judgment or decree within the meaning of 28 U.S.C. § 1257, even though further proceedings are contemplated. *See Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949) (the finality requirement must be given a "practical rather than a technical construction"); *Bradley v. Richmond School Board*, 416 U.S. 696, 722-23 n.28 (1974) (the court must follow a pragmatic approach to the question of finality).

Colorado seeks to avoid unnecessary proportionality reviews in this case and in future cases. As a practical matter, Colorado's interest cannot be protected unless action is taken at this stage. Irrespective of the outcome, Colorado will not be allowed to relitigate the propriety of the proportionality review itself. Thus, this case falls within the third category of cases delineated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477 (1975): "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *E.g.*, *New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984).

B. Federal Ground.

The Colorado Supreme Court decided this case both under the Eighth Amendment of the United States Constitution and Article II, section 20, of the Colorado Constitution. The court, however, did **not** apply the Colorado Constitution as an independent state ground. Instead, it expressly assumed that the "relevant requirements of the two constitutions are the same," *Gaskins*, Appendix B, n. 1 at B-2, and based its analysis on federal and state cases which were themselves grounded on federal law.

Since, in this case, the Colorado Supreme Court viewed the Colorado Constitution as a shadow of the United States Constitution (the Colorado Constitution means whatever the United States Constitution means), the decision necessarily rests on federal grounds. *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (when a state court decision appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, the Court will presume that the decision was grounded on federal law).

CONSTITUTIONAL PROVISIONS

The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

STATEMENT OF THE CASE

A. The offense.

On June 28, 1987, shortly after midnight, John Gaskins and a companion were seen trying to remove a candy vending machine from the lobby of the Viscount Hotel in Denver. They were stopped and questioned by a hotel employee. The two men told the hotel employee that they were taking the machine for repairs. At the employee's request, Gaskins went to the front desk to provide identification while Gaskins's companion stayed outside with the candy machine.

At the front desk, Gaskins was unable to produce any identification. He and the hotel employee then went outside and unsuccessfully tried to locate Gaskins's companion. While outside, Gaskins picked up a rock and swung it into the hotel employee's face, breaking his nose. The hotel employee grabbed Gaskins, and the two struggled. Gaskins punched the hotel employee several more times and bit him on the arm. Eventually, two other hotel employees arrived and held Gaskins for the police. The candy machine was recovered outside of the hotel.

B. Trial and sentencing.

On December 9, 1987, Gaskins was convicted by a jury of third-degree assault [1] and attempted theft [2]. The jury also determined that Gaskins had sustained three prior felony convictions: first, a 1976 conviction for second degree assault on a police officer; second, a 1981 conviction for attempted criminal

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[1] Colo. Rev. Stat. 18-3-204 (1986) (a class 1 misdemeanor).

[2] Colo. Rev. Stat. 18-2-101 (1986) (a class 5 felony).

trespass; third, a 1981 conviction for theft. Gaskins was therefore adjudged an habitual criminal under Colorado's recidivist statute, Colo. Rev. Stat. 16-13-101(2) (1986).[3]

Under Colorado's recidivist scheme, habitual criminals receive a mandatory life sentence with possible parole after 40 years.[4] Gaskins objected to imposition of this sentence on the ground that it was disproportionate to the gravity of his offense and therefore violated the cruel and unusual punishments clause of the eighth amendment. However, the trial court declined to perform a proportionality review.

C. Appeals.

Gaskins then turned to the Colorado Court of Appeals. In May of 1990, the court of appeals, after affirming Gaskins's conviction, vacated the life sentence and remanded for a full proportionality review and resentencing. The court stated that the trial court was better suited to conduct a full proportionality review, where the focus would be on "the defendant's record in its entirety, rather than upon the seriousness of the present offense." *People v. Gaskins,* No. 88CA159 (Colo. App. May 17, 1990) (unpublished opinion), Appendix A at A-4.

On January 3, 1992, the Colorado Supreme Court affirmed the ruling of the Colorado Court of Appeals. The supreme court approved the decision to remand for a full proportionality hearing under an "abuse of discretion" standard of review. The court found

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[3] Colo. Rev. Stat. 16-13-101(2) provides: "Every person convicted in this state of any felony, who has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes ... shall be punished by imprisonment ... for the term of his or her natural life.

[4] Colo. Rev. Stat. 17-22.5-104(2)(c) (1986).

that Gaskins's crimes were not "grave or serious" enough to show that the court of appeals had abused its discretion in ordering a full proportionality hearing. Appendix B at B-19.

The Colorado Supreme Court rejected Colorado's claim that life sentences imposed under Colorado's habitual criminal scheme require no full proportionality reviews. In the court's view, it is insufficient that Colorado requires four felony convictions before imposing a mandatory life sentence and that Colorado provides for possible parole after 40 years. Thus, held the court, it was proper to remand for an examination of the facts surrounding each individual offense and for possible comparison of Gaskins's sentence with other sentences from around Colorado and other states. Appendix B at B-9-11, B-19-20.

REASONS TO ALLOW THE WRIT

A writ of certiorari should be allowed in this case because the Colorado Supreme Court's decision conflicts with decisions of federal circuit courts and state courts on an issue of federal law. In particular, *Gaskins* conflicts with decisions of the United States Courts of Appeals for the Third, Fifth, and Sixth Circuits and the state courts of Tennessee about the extent to which the possibility of parole alleviates the need to conduct full proportionality reviews of prison sentences under the eighth amendment.

In addition, this court should grant certiorari to address a question which remains open and unclear after its decisions in this area: the extent to which prior convictions weigh in a threshold proportionality comparison of a recidivist's offense and the penalty imposed.

Both of these federal questions arise frequently, and both are important. S. Ct. R. 17.1.

I. BACKGROUND

A. *Rummel* and *Solem* are difficult to reconcile. These cases, as well as others addressing proportionality reviews of single offense prison sentences, have left important issues unresolved.

This Court has issued only two opinions addressing the constitutional proportionality of life sentences imposed under state recidivist schemes. In *Rummel v. Estelle*, 445 U.S. 263 (1980), this Court held that a sentence to life imprisonment under the Texas recidivist statute did not violate the proportionality doctrine embodied in the cruel and unusual punishments clause of the eighth amendment. The defendant's sentence was not constitutionally disproportionate to his offense of stealing $120.75 by false pretenses for several reasons. First, he had sustained two prior felony convictions, and the state had a legitimate interest in punishing recidivists more severely. *Id.* at 284-85. Second, he would be eligible for parole in as little as 12 years. Third, and most important, the length of a sentence is properly a legislative decision, and subjective line-drawing by the courts should be avoided.

Three years later, however, this Court invalidated a life sentence under facts similar to those in *Rummel*. In *Solem v. Helm*, 463 U.S. 277 (1983), an individual with six previous felony convictions was convicted of uttering a "no account check" for $100.00 and was sentenced to life imprisonment without the possibility of parole. This Court found that this sentence violated the proportionality principle after considering three factors: a comparison of the severity of the sentence with the gravity of the triggering offense; a comparison of the sentence with other sentences from the same jurisdiction; and a comparison of the sentence with sentences imposed for the same offense in other

jurisdictions.

Rummel and *Solem* are widely recognized as extremely difficult to distinguish on a rational basis. *See e.g., Marrero v. Dugger*, 823 F.2d 1468, 1474 dissent n.1 (11th Cir. 1987) *cert. denied*, 485 U.S. 965 (1988) ("two decisions that are difficult to reconcile"); Note, *Solem v. Helm: Extending Judicial Review under the Cruel and Unusual Punishments Clause to Require "Proportionality" of Prison Sentences*, 33 Cath. U.L. Rev. 479, 512 (1984) (*Solem* "cannot be rationally reconciled with *Rummel*"). The tension between these decisions has led to confusion over two important questions.

First, *Rummel* and *Solem* differ on the extent to which prior offenses may be viewed as justification for long sentences under a state's recidivist scheme. Despite the *Solem* Court's statement recognizing the validity of the state's interest in punishing recidivists more severely, 463 U.S. at 296, it simply did not accord nearly the same weight to the defendant's prior offenses as did the *Rummel* Court:

> Although the [*Solem v.] Helm* Court acknowledged a state's right to punish a recidivist more severely than a first offender, the Court's application of its proportionality test completely disregarded this valid state interest. By distinguishing violent from nonviolent crimes, *Helm* implies that past crimes should not be considered unless they were violent. *Helm* also instructs courts to "focus on the principal offense" because presumably the defendant has already been punished for the prior offenses. By employing an approach in which reviewing courts ignore a recidivist's criminal record, the *Helm* Court has all but overruled most recidivist statutes.

Note, *Solem v. Helm: Proportionality Review of Recidivist Sentencing*

is Required by the Eighth Amendment, 33 DePaul L. Rev. 149, 172 (1983) [hereinafter Note, *Proportionality Review*].

Second, it is unclear whether the difference in the outcomes of *Rummel* and *Solem* hinged on the availability of parole. Before *Gaskins* was decided, the Colorado Supreme Court took the view that "*Rummel* can only be distinguished from *Solem* by emphasizing the provision in the South Dakota statute which denies criminals the possibility of parole." *People v. Hernandez*, 686 P.2d 1325, 1330 n.4 (1984). This analysis, in other jurisdictions, has led courts to conclude that the possibility of parole is a dispositive factor in deciding whether a full proportionality review is appropriate. *See, e.g., Chandler v. Jones*, 813 F.2d 773 (6th Cir. 1987), and other authorities cited in Part IB, infra at 13.

This Court has also considered proportionality challenges in two cases involving prison sentences for single offenses. In *Hutto v. Davis*, 454 U.S. 370 (1982), this Court upheld a $20,000 fine and a 40 year prison term imposed for two counts of possession with intent to distribute nine ounces of marijuana. And, last year, in *Harmelin v. Michigan*, ___ U.S. ___, 111 S. Ct. 2680 (1991), this Court upheld a mandatory sentence of life imprisonment without parole for an individual convicted of possessing more than 650 grams of cocaine.

Hutto and *Harmelin* provide useful guidance about the nature of the eighth amendment proportionality guarantee. *Hutto* confirms the *Rummel* Court's view that the proportionality principle has only a limited application in prison sentence cases. *See Hutto*, 454 U.S. at 374 (courts should be reluctant to review legislatively mandated terms of imprisonment, and successful challenges to the proportionality of particular sentences should be exceedingly rare). *Harmelin* echoes this view: to the extent the

eighth amendment contains a proportionality guarantee at all [5], it is a "narrow" one as it applies to prison sentences. *Id.* (Kennedy, concurring) 111 S. Ct. at 2702; *United States v. Contreras*, 937 F.2d 1191, 1195 n.3 (7th Cir. 1991). Under *Harmelin*, full proportionality reviews (involving consideration of the second and third factors announced in *Solem*) are appropriate *only* "in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Id.* (Kennedy, concurring) 111 S. Ct. at 2707; *United States v. Salmon*, 944 F.2d 1106, 1130-31 (3rd Cir. 1991), *cert. denied*, 112 S. Ct. 1213 (1992).

However, because *Hutto* and *Harmelin* address questions that arise when a long sentence is imposed for a single, comparatively serious crime, they do not provide the necessary guidance for questions that arise when a life sentence is imposed for a comparatively less serious offense as part of a recidivist scheme. The *Gaskins* Court indicated that more guidance was necessary:

> The United States Supreme Court's recent decision in *Harmelin* ... leaves the future of *Solem* somewhat clouded. ... In the absence of more definitive guidance from the United States Supreme Court, we shall adhere to our prior understanding of the requirements of *Solem*.

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[5] Following a detailed analysis, Justice Scalia and Chief Justice Rehnquist concluded that *Solem* had simply been wrong in holding that the eighth amendment contains a proportionality guarantee applicable to prison sentences. *Id.* 111 S.Ct. 2686. Justices Kennedy, O'Connor, and Souter held that, irrespective of whether Justices Scalia and Rehnquist had been correct, the doctrine of *stare decisis* required this Court to recognize a narrow proportionality principle applicable to prison sentences. *Id.* at 2702.

Gaskins, Appendix B, n. 10 at B-10. *See also United States v. Johnson*, 944 F.2d 396, 408 (8th Cir.), *cert. denied*, 112 S. Ct. 646 (1991) ("The effect of *Harmelin* on the *Solem* proportionality factors is not entirely clear").

B. Under an analysis which reconciles the governing authority, full proportionality reviews are unnecessary when life sentences are imposed pursuant to a statutory scheme like Colorado's.

The questions born of the tension between *Rummel* and *Solem*, and left unanswered by *Harmelin*, are presented here. If prior convictions are viewed as providing substantial support for a recidivist's mandatory sentence, then an extended proportionality review is unnecessary. Similarly, if the possibility of parole is a significant factor, an extended proportionality review is unnecessary.

Colorado's view on these issues reconciles, to the fullest extent possible, the applicable decisions of the United States Supreme Court. Its analysis leads to this conclusion: Under Colorado's present recidivist scheme, full proportionality reviews are never necessary under the eighth amendment. A threshold comparison of the crime and penalty will always demonstrate that the sentence is not grossly disproportionate. Colorado's position is correct for three reasons.

First, the Colorado legislature has expressed the electorate's view that recidivists should receive mandatory life sentences. This scheme represents the clearest expression of society's interests and views, including views about what is or is not a proportional sentence:

> A legislatively mandated sentence can be viewed as a definitive statement of the public interest in penalizing certain behavior. Such a sentence carries a presumption of validity if reviewed by a court because the legislature presumably considered proportionality criteria when it defined the offense and set the penalty.

Note, *Solem v. Helm: Extension of Eighth Amendment Proportionality Review to Noncapital Punishment*, 69 Iowa L. Rev. 775, 793 (1984) [hereinafter Note, *Extension of Eighth Amendment Proportionality*].

Accordingly, sentences imposed under Colorado's scheme should be entitled to great deference by the courts, under applicable separation of powers principles. The analysis of *Rummel*, rather than *Solem*, should therefore apply. *See* Note, *Extension of Eighth Amendment Proportionality*, *supra* at 794 ("*[Solem]*, in contrast to *Rummel*, involved a statute that specified only a maximum sentence. The statute therefore did not contain as clear an expression of the public's interest in dealing with recidivists as the Texas statute in *Rummel*").

Second, Colorado does not impose a life sentence until the defendant has sustained his fourth felony conviction (one triggering felony and three prior felonies). This insures that, in the threshold comparison of the crime and sentence, the gravity of the offense will always be substantial. Life sentences have been upheld under significantly less stringent recidivist standards. *E.g.*, *Rummel* (two prior convictions required under Texas statute); *Moreno v. Estelle*, 717 F.2d 171 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984) (Texas statute); *Chandler v. Jones*, *supra* (two prior convictions required under Tennessee statute).

Of course, the continuing enactment of new crimes creates the possibility that the Colorado legislature could punish, as a

"felony," some type of trivial misconduct. In such a case, a full proportionality review would be warranted, and the outcome of such a review might well be invalidation of the sentence under the eighth amendment. This is what the *Rummel* Court was contemplating when it spoke of the "exceedingly rare" case. *Id.* 445 U.S. at 263. (An example of this would be "felony overtime parking." *Id.* 445 U.S. at 274 n.11.) However, as long as recidivists' sentences are supported by crimes traditionally punishable as serious violations of the law, there is no need to go beyond a threshold comparison. *Rummel*, 445 U.S. 274 ("for crimes concededly classified and classifiable as felonies ... the length of the sentence actually imposed is purely a matter of legislative prerogative").

Third, Colorado's scheme provides for a possibility of parole. In the threshold comparison, this fact modulates the severity of the mandatory life sentence, making unlikely any inference of gross disproportionality. The possibility of parole has been viewed as a decisive factor obviating any need for a full proportionality review. *See, e.g., Moreno v. Estelle*, 717 F.2d 171, 180-81 (5th Cir. 1983), *cert. denied*, 466 U.S. 975 (1984) 180-81 (defendant's case was not "clearly distinguishable" from *Rummel* because there was possible parole in 20 years); *Chandler v. Jones*, 813 F.2d 773, 778-79 (6th Cir. 1987) (*Rummel* controls in a similar factual situation, *i.e.*, when the life sentence includes the possibility of parole; thus, when there is possible parole, the proportionality challenge may be rejected without application of *Solem*'s objective criteria); *United States v. Rosenberg*, 806 F.2d 1169, 1175 (3rd Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987) ("apart from *Solem's* particular factual context -- a life sentence without the possibility of parole -- an abbreviated proportionality review" is sufficient); *State v. Wilson*, 687 S.W.2d 720 (Tenn. Crim. App. 1984), *cert. denied*, 472 U.S. 1030 (1985) (convictions under Tennessee's recidivist statute will never require proportionality reviews because there is parole eligibility after 30 years).

II. *GASKINS* CONFLICTS WITH DECISIONS OF FEDERAL AND STATE COURTS.

In rejecting Colorado's approach and concluding that a full proportionality review was appropriate, the *Gaskins* Court necessarily departed from eighth amendment analysis relied on by other courts. As noted above, both circuit and state courts have held that the possibility of parole itself obviates the need for full proportionality reviews. *United States v. Rosenberg*, (3rd Cir.) supra; *Moreno v. Estelle*, (5th Cir.) supra; *Chandler v. Jones*, (6th Cir.) supra; *State v. Wilson*, (Tenn. Crim. App.), *supra*; *accord*, *State v. Freeman*, 669 S.W.2d 688 (Tenn. Crim. App. 1983). *But see Marrero v. Dugger*, 823 F.2d 1468 (11th Cir. 1987).

The *Gaskins* decision departs from decisions of this Court as well. The *Gaskins* Court would find a full proportionality review appropriate, whenever ordered, as long as the threshold comparison of the crime and sentence indicates no "abuse of discretion." This standard contemplates a much broader application of the eighth amendment proportionality principle to prison sentences than does the "gross disproportionality" standard announced in *Harmelin*. For example, under the *Gaskins* standard, full proportionality reviews would have been appropriate in both *Rummel* and *Hutto*. The *Harmelin* standard, in contrast, "takes full account" of the fact that proportionality reviews were held to be inappropriate in *Rummel* and *Hutto*. *Harmelin*, (Kennedy, concurring) 111 S. Ct. at 2707.

Gaskins also differs in that it remands for an examination of the facts and circumstances underlying each of the defendant's offenses. This is not the inquiry employed by this Court when comparing the gravity of the offense and harshness of the penalty in *Harmelin*. The *Harmelin* concurrence assessed the gravity of the offense based only on the statutory elements (*i.e.*, possession of more than 650 grams of a controlled substance, cocaine). *Id.* at

2705. (The individual facts surrounding the offense were cited merely to demonstrate that Michigan's mandatory sentence had discretionary components. *Id.* at 2709.)

Admittedly, the *Solem* Court did consider underlying facts in its assessment, but this approach has been criticized for giving too little deference to the legislature's decision:

> One might wonder if, in assessing the seriousness of the crime, a court ought to take into account what the legislature had in mind when making the offense a crime and not simply whether the actual result of the crime was violent in the particular case.

Note, *Solem v. Helm*, 22 Duq. L. Rev. 1069, 1083 (1984).

III. THIS CASE IS IMPORTANT.

A. *Gaskins* will have a significant and burdensome impact on judicial resources and state law enforcement.

Colorado's interests are seriously affected by the *Gaskins* decision. Most immediately, Colorado will be required to hold a full proportionality hearing which is unnecessary and which will not aid a proper eighth amendment determination. The hearing is unnecessary because John Gaskins is a legitimate recidivist. If *Rummel* is correct that the punishment of recidivism is a valid state interest, then Gaskins's life sentence with possible parole cannot be viewed as grossly disproportionate. If, as *Hutto* held, it is constitutionally permissible to sentence an individual to 40 years for possession of nine ounces of marijuana with an intent to distribute, then it is permissible to impose a sentence of life with possible parole after 40 years for a *fourth* felony. Gaskins's

sentence is not unconstitutional under *Solem* because his triggering offense was more serious than the one in *Solem*, and his prior convictions include a violent offense -- second degree assault on a police officer.

The evidence obtained in Gaskins's forthcoming review will be of questionable value, particularly if either side presents statistical data on sentences from around Colorado or other states. Such data is likely to be unreliable, susceptible to manipulation, and largely irrelevant. Rather than examining other sentences imposed for attempted theft (an inquiry which could be useful when reviewing a discretionary sentence, such as the one in *Solem*), it would be more relevant to observe that Colorado imposes a life sentence on *every* habitual criminal.

But the real harm caused by *Gaskins* will be in future cases. *Gaskins* is controlling authority in Colorado and persuasive authority elsewhere in the county. Left uncorrected, it will cause Colorado and other states to undergo many unnecessary full proportionality reviews -- hearings which will be time-consuming and expensive, will involve difficult evidentiary problems, and will produce results of questionable utility. In the aggregate, these reviews will be a significant burden, particularly since, as *Gaskins* demonstrates, the courts are inclined to examine the facts surrounding each conviction. "The examination of factual details places an unquestionable strain on the court system and jeopardizes judicial economy. ... This could be considered a compelling state interest justifying a constitutional rejection of the [*Solem v. Helm*] test under certain circumstances." Note, *State v. Davis*, 17 U. Balt. L. Rev. 572, 582 n. 82 (1988).

B. This Court should address the questions which remain unanswered in this area.

It has been nine years since this court addressed the constitutional proportionality of a life sentence imposed under a state's recidivist scheme. *Harmelin* does not address questions which arise in this context and thus does not dispel much of the confusion that exists. There is a real need for further guidance.

The questions presented in this case are of national importance. Almost all states have some sort of recidivist scheme. [6] A review of *Gaskins* would provide much-needed instruction about the separation of powers principles generally applicable to eighth amendment proportionality reviews. It is clear that the fixing of prison terms is "properly within the province of legislatures, not courts." *Harmelin* at 2703, *quoting Rummel*, 445 U.S. at 275-76. But the Colorado Supreme Court has demonstrated its willingness to allow second-guessing about the propriety of a recidivist's sentence whenever such an examination would not be an "abuse of discretion." This, ultimately, will lead to improper invalidations of sentences and a frustration of legislative recidivist schemes.

Colorado well understands that its sentence here was severe. But the eighth amendment permits the states to take crime seriously. *Harmelin* (Kennedy, concurring) 111 S.Ct. at 2709. And society is not well served when the courts act unnecessarily to insulate the citizens from the acts of their elected representatives. The Colorado electorate should be free to choose its own approach, subject only to *constitutional* limitations.

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[6] *See* Note, *Proportionality Review*, *supra* Appendix at 177-82.

CONCLUSION

For the reasons above, this Court should grant the petition for writ of certiorari.

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APPENDIX A

COLORADO COURT OF APPEALS

No. 88CA0159

THE PEOPLE OF THE STATE OF COLORADO,	)
Plaintiff-Appellee,	)
v.	)
JOHN HARVEY GASKINS,	)
Defendant-Appellant.	)

Appeal from the District Court of the
City and County of Denver
No. 87CR1541

Honorable Lynne Hufnagel, Judge

DIVISION II
Opinion by JUDGE SMITH
Plank and Metzger, JJ., concur

JUDGMENT AFFIRMED,
SENTENCES VACATED,
AND CAUSE REMANDED
WITH DIRECTIONS

Defendant, John Harvey Gaskins, appeals the judgment of conviction entered on a jury verdict finding him guilty of second degree assault and attempted theft over $300. He also appeals from the life sentence imposed as a result of his adjudication as an habitual criminal. We affirm.

The trial evidence established that defendant and a companion were seen attempting to remove a vending machine from a hotel. When confronted by a hotel employee, the men stated that they were taking the machine away for repairs. The employee asked for identification or paperwork, at which point defendant accompanied the employee to another location presumably to produce his identification. At the same time, defendant's companion loaded the machine into the trunk of a car. When defendant was unable to produce any identification and was asked to remain in the hotel, a struggle broke out, and defendant struck the hotel employee with a rock.

I.

Defendant maintains that the evidence of attempted theft was insufficient was a matter of law to support the verdict. He argues that because the evidence established that it was his companion who actually took the machine out of the building, and who instructed defendant to show the hotel employee his identification, the People failed to prove that defendant possessed the requisite intent to deprive the hotel permanently of the use or benefit of the vending machine. He also suggests that he may have been incapable of forming the *mens rea* for this offense because of intoxication. We disagree.

A challenge to the sufficiency of the evidence requires a reviewing court to determine whether the evidence, both direct and circumstantial, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support the conclusion by a reasonable person that defendant is guilty beyond a reasonable doubt. *Kogan v. People*, 756 P.2d 945 (Colo. 1988).

A person commits theft if he knowingly obtains or exercises control over anything of value of another without authorization and with the intent to deprive the other person permanently of the

use or benefit of the thing of value. Section 18-4-401(1), C.R.S. (1986 Repl. Vol. 8B). Theft may be established by circumstantial evidence alone, *see Hunter v. People*, 172 Colo. 480, 474 P.2d 207 (1970), and a defendant's wrongful intent may be inferred from his conduct and the circumstances surrounding the case. *People v. Pedrie*, 727 P.2d 859 (Colo. 1986).

We are satisfied that here there was substantial direct and circumstantial evidence to support the guilty verdict for attempted theft over $300. An investigating officer testified that he questioned defendant about the incident, defendant admitted that he and his companion had gone to the hotel to buy a drink from the machine and, while there, had decided to take the machine. This uncontroverted direct testimony alone was sufficient for the fact-finder to conclude that defendant possessed the *mens rea* required to commit the offense.

There was also, however, ample circumstantial evidence from which the jury could infer defendant possessed the requisite intent. Both defendant and his companion were initially seen attempting to remove the machine from the building, and a witness eventually saw the machine in the trunk of a car parked outside the building.

Furthermore, from defendant's actions, the jury could conclude that he had purposefully diverted the attention of the hotel employees while his companion loaded the machine into the car. Thus, the jury also could have found defendant guilty on the basis of his complicity in the offense. Nor was any evidence produced to refute the testimony of a prosecution witness that defendant was not so intoxicated as to be unable to appreciate his actions.

II.

Defendant was sentenced as an habitual criminal, with five

previous felonies, to life imprisonment. He argues that the life sentence he received constituted cruel and unusual punishment, and that the court erred in failing to conduct a proportionality review in light of his objection to the lengthy sentence. We agree that such review is required.

Solem v. Helm, 463 U.S. 277, 103 S. Ct. 3001, 77 L.Ed. 2d 637 (1983) enumerates three factors that must be considered in reviewing an habitual criminal conviction: the gravity of the offense and the harshness of the penalty, sentences imposed on other criminals in the same jurisdiction, and sentences imposed for commission of the same crime in other jurisdictions. An extended analysis is not required. *Solem v. Helm, supra.*

In *People v. Austin*, ___ P.2d ___ (Colo. App. No. 87CA1648, April 26, 1990), we held that the trial court is in a better position than the appellate court to conduct the proportionality review. This is particularly true when the focus is on the defendant's record in its entirety, rather than upon the seriousness of the present offense.

Accordingly, the judgment of conviction on the assault and attempted theft are affirmed. The life sentence is vacated, and the cause is remanded for resentencing after a proportionality review by the trial court.

JUDGE METZGER and JUDGE PLANK CONCUR.

APPENDIX B

SUPREME COURT, STATE OF COLORADO
NO. 90SC437 January 13, 1992

THE PEOPLE OF THE STATE OF COLORADO, Petitioner,
v.
JOHN HARVEY GASKINS, Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED

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JUSTICE LOHR delivered the Opinion of the Court.

We granted the People's petition for certiorari to determine whether the Colorado Court of Appeals correctly concluded that the defendant, John Harvey Gaskins, was entitled to a proportionality review of a life sentence imposed pursuant to the habitual criminal statute, section 16-13-101, 8A C.R.S. (1986), and, if so, whether the court abused its discretion in remanding the case to the trial court to conduct the review. We hold that a proportionality review of a life sentence imposed under the Colorado habitual criminal statute is required by the cruel and unusual punishments clauses of the United States and Colorado Constitutions.[1] In addition, we conclude that the court of appeals acted within its discretion in vacating Gaskins' sentence and remanding the case to the trial court with directions to resentence after conducting a proportionality review. Accordingly, we affirm the judgment of the Colorado Court of Appeals.

I.

We derive the following description of relevant events from the evidence adduced at a trial before a jury. On June 28, 1987,

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[1]The Eighth Amendment to the United States Constitution and article II, section 20, of the Colorado Constitution provide that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Eighth Amendment proscription of cruel and unusual punishments is applicable to the states through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660 (1962). The defendant does not contend that the Colorado Constitution provides any protections additional to those available under the United States Constitution with respect to the proportionality issue before us in this case. We therefore assume for the purpose of this opinion that the relevant requirements of the two constitutions are the same.

shortly after midnight, Gaskins and a companion were observed attempting to remove a candy vending machine from the lobby of the Viscount Hotel in Denver. A hotel employee questioned the men, and they responded that the machine was being removed for repairs. At the employee's request, Gaskins went with him to the front desk but was unable to produce identification. Gaskins then accompanied the employee outside, where they unsuccessfully sought to locate Gaskins' companion. Gaskins then assaulted the employee with a rock, breaking his nose. A scuffle ensued, during which Gaskins bit the employee on the arm. Gaskins was eventually restrained by two other hotel employees, and the vending machine was later recovered outside the hotel. Gaskins was brought to trial in Denver District Court and convicted of third-degree assault[2] and criminal attempt to commit theft.[3] He was also adjudged to be a habitual criminal based on the jury's determination that he had sustained three prior felony convictions. *See* § 16-13-101.

In the absence of Gaskins' conviction as a habitual criminal, the applicable sentencing statutes would have subjected him to a maximum sentence of two years imprisonment for third-degree assault, § 18-1-106, 8B C.R.S. (1986), and to a maximum sentence of four years imprisonment for attempt to commit theft, § 18-1-105(1)(a)(IV), 8B C.R.S. (1986 & 1991 Supp.). Gaskins, however, received a mandatory sentence of life imprisonment pursuant to the habitual criminal statute, section 16-13-101. The jury determined that he had previously been convicted of three

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[2]§ 18-3-204, 8B C.R.S. (1986) (a class 1 misdemeanor).

[3]§ 18-2-101, 8B C.R.S. (1986) (a class 5 felony). This section was amended in 1989 after Gaskins was sentenced. *See* § 18-2-101, 8B C.R.S. (1991 Supp.). The amendment altered the felony classifications for attempt offenses, but even if applicable, would not have changed Gaskins' offense from a class 5 felony.

felonies, which provided the basis for his habitual criminal conviction. The first occurred in 1976, when Gaskins entered a guilty plea to a charge of second-degree assault, a class 4 felony, for an assault on a police officer, and was sentenced to four years imprisonment. The second felony conviction occurred in June of 1981, when a jury found him guilty of attempt to commit criminal trespass, a class 5 felony. He received a sentence of eighteen months imprisonment plus one year parole for that crime. The third felony conviction was entered in August of 1981, based on Gaskins' plea of guilty to a charge of theft, a class 4 felony, for entering an apartment and taking a jacket, tie tack, and knife. The court sentenced him to four years imprisonment plus one year probation for that offense.

Gaskins objected to the imposition of a life sentence in the present case, asserting that it is disproportionate to the gravity of the crime and, therefore, in violation of the cruel and unusual punishments clauses of the United States and Colorado Constitutions.[4] The trial court noted the objection but found that the information accompanying the objection was insufficient to conduct a proportionality review.[5] The court then ruled that

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[4]The claim under the Colorado Constitution was first raised in a brief filed by the defendant in the court of appeals. The People have not objected to consideration of this issue. As noted in footnote 1, above, the defendant does not argue that the Colorado Constitution provides any protections additional to those available under the federal constitution with respect to the cruel and unusual punishments issue. We therefore elect to consider both the federal and state constitutional issues.

[5]Although the record suggests a question whether the defendant properly presented the Eighth Amendment proportionality issue in the trial court, the People have not argued for reversal on that basis. In the interest of judicial economy, we elect to treat the proportionality issue as properly before us.

imposition of a life sentence is mandatory under section 16-13-101 upon conviction as a habitual criminal, and sentenced Gaskins accordingly.

The court of appeals affirmed the judgment of conviction but vacated the life sentence and remanded the case for a proportionality review and resentencing. *People v. Gaskins*, No. 88CA0159 (Colo. App. May 17, 1990) (unpublished opinion). The court held that the trial court is in a better position to conduct a proportionality review, particularly "when the focus [is] on the defendant's record in its entirety, rather than upon the seriousness of the present offense." *Gaskins*, slip op. at 4. We granted certiorari to determine whether the court of appeals abused its discretion by remanding the case for a proportionality review.

We first set forth the provisions of the habitual offender statute at issue in this case and review the standards for proportionality review established by the United States Supreme Court in the seminal case of *Solem v. Helm*, 463 U.S. 277 (1983). We then address and reject the People's argument that proportionality review of a life sentence imposed under the Colorado habitual criminal statute is not constitutionally required. Finally, we consider the standards for conducting the constitutionally required proportionality review of a sentence and for determining whether such a review can be performed initially by an appellate court without the necessity for remand. As a result of our analysis, we conclude that the court of appeals acted within its discretion in remanding this case to the trial court to review Gaskins' sentence for proportionality.

II.

A.

The Colorado habitual criminal statute provides in pertinent part that

> [e]very person convicted in this state of any felony, who has been three times previously convicted, upon charges separately brought and tried, and arising out of separate and distinct criminal episodes, either in this state or elsewhere, of a felony ... shall be adjudged an habitual criminal and shall be punished by imprisonment in a correctional facility for the term of his or her natural life.

§ 16-13-101(2). A person sentenced to life imprisonment pursuant to the habitual criminal statute is not eligible for parole "until he has served at least forty calendar years...." § 17-22.5-104(2)(c), 8A C.R.S. (1986).[6]

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[6]§ 17-22.5-104(2) was amended in 1990 by the addition of a new subsection (d) providing that "[n]o inmate imprisoned under a life sentence for a crime committed on or after July 1, 1990, shall be eligible for parole." Ch. 118, sec. 3, § 17-22.5-104(2)(d), 1990 Colo. Sess. Laws 927, 928. § 17-22.5-104(2)(d) was amended in 1991 to read:

> No inmate imprisoned under a life sentence for a class 1 felony committed on or after July 1, 1990, shall be eligible for parole. No inmate imprisoned under a life

B.

The United States Supreme Court addressed a cruel and unusual punishments challenge to the constitutionality of South Dakota's recidivist statute, an act bearing some similarities to the Colorado habitual criminal statute,[7] in *Solem v. Helm*, 463 U.S. 277 (1983). The South Dakota statute authorized a maximum sentence of life imprisonment without parole for a felony conviction when the defendant had sustained at least three prior convictions. The defendant in *Solem* sought habeas corpus relief from a sentence to life imprisonment under the recidivist statute for the felony offense of passing a "no account" check for $100. His record included six prior felony convictions, three for third-degree burglary, and one each for obtaining money under false pretenses, grand larceny, and third-offense driving while intoxicated. The Court noted that the record contained no details about the circumstances of the prior offenses except that "they were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case," *id.* at 280, as it was in the commission of the offense for which the defendant in *Solem* was

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> sentence pursuant to section 16-13-101(2), C.R.S., for a crime committed on or after July 1, 1990, shall be paroled until such inmate has served at least forty calendar years, and no application for parole shall be made or considered during such period of forty years.

Ch. 73, sec. 4, § 17-22.5-104(2)(d), 1991 Colo. Sess. Laws 402, 404.

[7]In contrast to the Colorado habitual criminal statute at issue in this case, South Dakota's recidivist statute provided that a life sentence was a maximum sentence but not a mandatory sentence.

being sentenced. *Id.* at 279-81. The Court held that the cruel and unusual punishments clause of the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Id.* at 284. Concluding that the defendant's sentence was "significantly disproportionate to his crime," *id.* at 303, the Court affirmed the judgment of the Eighth Circuit Court of Appeals directing that the defendant's petition for habeas corpus relief be granted unless the state resentenced the defendant. *Id.* at 283-84, 303.

In reaching the result in *Solem*, the Court held "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted" and that "no penalty is *per se* constitutional." *Id.* at 290. The Court cautioned, however, that "[r]eviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals." *Id.* at 290.

In *Solem*, the Court identified three sets of objective factors, or criteria, to be employed in reviewing sentences for proportionality under the Eighth Amendment. First, a court must examine the gravity of the offense and the harshness of the penalty. *Id.* at 290-91. Second, "it may be helpful" to compare the sentence to the sentences imposed on other criminals in the same jurisdiction. *Id.* at 291. "If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive." *Id.* Third, a court "may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 291-92. Applying these factors, the Court in *Solem* concluded that the defendant's sentence did not satisfy the proportionality requirement

of the Eighth Amendment.[8]

III.

We have held in *Alvarez v. People*, 797 P.2d 37 (Colo. 1990), *People v. Drake*, 785 P.2d 1257 (Colo. 1990), and *People v. Hernandez*, 686 P.2d 1325 (Colo. 1984), based on our analysis of *Solem*, that a defendant who challenges the constitutionality of a life sentence imposed under Colorado's habitual criminal statute is entitled to a proportionality review of that sentence under the United States Constitution.[9] The People ask that we reconsider those holdings and urge that the possibility of parole, the requirement of four felony convictions before a life sentence can be imposed, and the fact that "trivial misconduct" is not classified as a felony in Colorado all contribute to the conclusion that *Solem* does not apply and proportionality review is not constitutionally

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[8]The Court distinguished *Rummel v. Estelle*, 445 U.S. 263 (1980), in which it had upheld a life sentence imposed under a Texas recidivist statute against a challenge that it violated the cruel and unusual punishments clause of the Eighth Amendment. The principal ground of distinction was the possibility of parole under Texas' sentencing scheme. Under the Texas system of good time credits, a prisoner receiving a life sentence could become eligible for parole in as short a time as ten years and, historically, could have expected to become eligible, in the normal course of events, in only twelve years. *Solem*, 463 U.S. at 300-02. The Court held that South Dakota's system of executive commutation, which amounted to an ad hoc exercise of executive clemency rather than a benefit available under a structured legislative system of entitlement based on objective standards, was fundamentally different from the Texas system of parole. *Id.* at 300-03.

[9]Our holding in *Alvarez* was also based on article II, section 20, of the Colorado Constitution. 797 P.2d at 38.

required. We find nothing in these arguments, which are based on considerations that were familiar to this court when *Alvarez*, *Drake*, and *Hernandez* were decided, that casts into question the soundness of our holdings in those cases.[10] As we stated in *Alvarez*, "[t]he provisions of the Habitual Criminal Act create a unique possibility that a defendant will receive a life sentence which is not proportionate to the crime for which the defendant has been convicted." 797 P.2d at 40. We therefore reject the People's invitation to reconsider our conclusion that a defendant is entitled to a proportionality review of a life sentence imposed

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[10]The United States Supreme Court's recent decision in *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), leaves the future of *Solem* somewhat clouded. In *Harmelin*, in a 5-4 decision the Court upheld a statutorily mandated life sentence without possibility of parole for the crime of possession of more than 650 grams of cocaine, a quantity which Justice Kennedy described as having "a potential yield of between 32,500 and 65,000 doses." *Id.* at 2705 (Kennedy, J., concurring). The justices produced five separate opinions. Justice Scalia, joined by Chief Justice Rehnquist, wrote that *Solem* was wrongly decided in that the Eighth Amendment contains no proportionality guarantee with respect to the length of legislatively authorized sentences of imprisonment. Justice Kennedy, joined by Justices O'Connor and Souter, would read prior cases including *Solem* to hold "that intra- and inter-jurisdictional analyses [the second and third factors in *Solem*] are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 111 S. Ct. at 2707. Justice White, joined in the relevant parts of his analysis by Justices Blackmun, Stevens, and Marshall, reads *Solem* to require that the three sets of factors identified in that case as applicable to proportionality analysis apply in all proportionality reviews under the Eighth Amendment. In absence of more definitive guidance from the United States Supreme Court, we shall adhere to our prior understanding of the requirements of *Solem*. *See* section IIB of this opinion.

under the habitual criminal statute and that this entitlement is grounded in the Eighth Amendment to the United States Constitution and article II, section 20, of the Colorado Constitution.

IV.

The People contend that if the defendant is entitled to a proportionality review of his life sentence, the review should have been conducted by the court of appeals. The People argue, therefore, that the court of appeals abused its discretion by remanding the case to the trial court for this purpose. In order to assess the merits of this argument, we must delineate the character and scope of the review to which the defendant is entitled. In that way, we can determine whether such a review entails the determination of facts, a task for which a trial court is uniquely suited, or simply a review of the existing record, a function that an appellate court can perform without the necessity for remand.

We first considered the nature and scope of a required proportionality review in *Hernandez*, 686 P.2d 1325. The defendant was convicted of second-degree burglary and conspiracy to commit second-degree burglary, and was adjudicated a habitual criminal. His habitual criminal status was based on prior convictions for six felonies including robbery and sale of narcotic drugs. *Id.* at 1329 n.3. He received a mandatory sentence to life imprisonment based on his habitual criminal conviction. The defendant challenged his sentence under the cruel and unusual punishments clause of the Eighth Amendment, contending that a life sentence predicated on a felony involving a "non-violent crime against property" cannot stand. *Id.* at 1329. We rejected this challenge. We acknowledged the requirement under *Solem* that the defendant receive a proportionality review and noted as well *Solem's* adoption of "[t]hree objective criteria which may guide proportionality review of a habitual criminal sentence." *Id.* at 1330. Our review, however, consisted of noting the gravity of both the

substantive offense for which the defendant was convicted and the prior felonies upon which his adjudication as a habitual offender was based, and observing that all the offenses were "more serious than those in *Solem*, and include serious violent crimes." *Id.* In addition, we took into account that, in contrast to South Dakota's statute reviewed in *Solem*, Colorado's sentencing statutes provided for the possibility of parole. The defendant was eligible for parole after serving twenty years. *See* § 17-2-207, 8 C.R.S. (1978 & 1983 Supp.). The report contains no suggestion that the defendant presented information or argument concerning sentences imposed for other crimes in Colorado or for the same crime in other jurisdictions, the second and third *Solem* factors.

We applied *Hernandez* in *People v. Drake*, 785 P.2d 1257, in which the defendant was convicted of accessory to the crime of first-degree murder and sentenced to life imprisonment based on his adjudication as a habitual criminal. We noted the three criteria set forth in *Solem* for conducting a proportionality analysis. However, we did not specifically discuss the second and third *Solem* criteria. We limited our analysis to the conclusion that accessory to first-degree murder is a more serious offense than the second-degree burglary offenses for which the defendant in *Hernandez* was convicted. We noted additionally that the defendant in *Drake* would be eligible for parole in twenty years. Without detailed analysis, we stated that our rejection of the defendant's Eighth Amendment challenge also was arrived at in view of "the length of the defendant's parole-eligible sentence compared to sentences imposed on other defendants in this and other jurisdictions." *Id.* at 1275.

In *Alvarez v. People*, 797 P.2d 37, we again had occasion to consider the nature and scope of a required proportionality review of a life sentence imposed under the habitual criminal act. The defendant was convicted of aggravated robbery, theft, and conspiracy to commit aggravated robbery and theft and was found by the jury to be a habitual criminal. *Id.* at 38. The habitual

criminal determination was based on previous convictions for second-degree burglary, criminal attempt to commit theft, first-degree criminal trespass, and criminal attempt to commit second-degree burglary. *Id.* at 38, 41. The defendant argued that he was entitled to what we characterized as an "extensive proportionality review," incorporating all three of the *Solem* criteria, and that the review must be accomplished by the trial court. *Id.* at 38-39. We disagreed and conducted an abbreviated proportionality review. In doing so, we observed that we had upheld the defendant's life sentence in *Hernandez* under an "abbreviated proportionality review," in which we considered "the gravity of the offenses he committed, including the fact that some of the offenses were 'serious violent crimes,' and the fact that the defendant would be eligible for parole." *Id.* at 40 (quoting *Hernandez*, 686 P.2d at 1330). Concluding in *Alvarez* that the offenses underlying the defendant's conviction and the offenses previously committed upon which his habitual criminal status was based "all represent serious violations of Colorado law," and that "the defendant is eligible for parole," we determined that only an abbreviated proportionality review was necessary.[11] *Id.* at 41. In conducting that review, we relied on the analysis in *Hernandez*, and held that the life sentence was consistent with the federal and Colorado constitutional proscriptions of cruel and unusual punishments, given the gravity of the offenses and the fact that the defendant would be eligible for parole in forty years. As in *Hernandez*, there is no suggestion that the defendant presented information or argument that the sentence was inconsistent with sentences imposed for other crimes in Colorado or in other jurisdictions.

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[11]In *Alvarez*, we observed that except in rare cases only an abbreviated proportionality review will be required. 797 P.2d at 41. Presuming, as we do, that the overwhelming majority of prosecutorial charging decisions are made with sensitivity to the seriousness and extent of a defendant's criminal record, this will be the case.

The rule to be gleaned from *Alvarez, Drake,* and *Hernandez* is that only an abbreviated review is necessary when the crimes supporting a habitual criminal sentence include grave or serious offenses and when the defendant will become eligible for parole, albeit not for forty years. The abbreviated review itself simply consists of a scrutiny of the offenses in question to determine whether in combination they are so lacking in gravity or seriousness as to suggest that a life sentence is constitutionally disproportionate to the crime, taking into account the defendant's eligibility for parole. In the absence of an inference of disproportionality suggested by this review or by presentation of information by the defendant that calls into question whether the sentence is disproportionate to sentences imposed on other criminals in Colorado or other jurisdictions, the second and third factors in the *Solem* test need not be explicitly employed.[12] *Cf. Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., joined by O'Connor and Souter, J.J., concurring). *But see Harmelin*, 111 S. Ct. at 2715 (White, J., joined by Blackmun and Stevens, J.J. dissenting, with Marshall, J., agreeing, 111 S. Ct. at 2719). The initial scrutiny of these matters to determine whether more than an abbreviated review is necessary is not a demanding one, and only rare cases will require an extended analysis. *Alvarez*, 797 P.2d at 41.

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[12]Justice White's dissent in *Harmelin* makes the point that "only when a comparison is made with penalties for other crimes and in other jurisdictions can a court begin to make an objective assessment about a given sentence's constitutional proportionality, giving due deference to 'public attitudes concerning a particular sentence.'" 111 S. Ct. at 2715 (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)) Certainly, in assessing the gravity or seriousness of an offense when considering cruel and unusual punishments challenges to a sentence we have implicitly taken into account the nature of other criminal offenses under Colorado law and the penalties prescribed for their violation.

The determination of whether the crimes involved in a habitual criminal conviction are grave or serious necessarily is somewhat imprecise. *Solem* offers helpful guidance in evaluating the gravity of an offense. The Court observed that offenses can be compared "in light of the harm caused or threatened to the victim or society, and the culpability of the offender." *Solem*, 463 U.S. at 292. In assessing the harm caused or threatened to society, relevant considerations include whether the crime involves violence, and the absolute magnitude of the crime (*e.g.*, theft of a large amount usually can be viewed as more serious than theft of a small amount, other circumstances being the same). *Id.* at 292-93. In general, a lesser-included offense is not as serious as the greater-inclusive offense, an attempt is less serious than a completed crime, and an accessory after the fact should not be subject to a higher penalty than the principal. *Id.* at 293. In evaluating the culpability of the offender, South Dakota's criminal statutes, for example, created a descending scale of culpability, ranking acts as malicious, intentional, knowing, reckless, or negligent. *Id.* Motive is also relevant. *Id.* *Solem* made clear that this list is not exhaustive but merely illustrative that there are "generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes." *Id.* at 294.

In *Alvarez*, *Drake*, and *Hernandez* we did not find it necessary to pursue a detailed analysis to determine the gravity of the crimes in relation to the harshness of the penalty of life imprisonment. The crimes of aggravated robbery, robbery, burglary, and accessory to first-degree murder involve violence or potential for violence by their very nature. Sale of narcotic drugs is viewed with great seriousness because of the grave societal harm caused by sale of illegal drugs and the evils associated with their use. Of importance in each case was the defendant's eligibility for parole. In *Hernandez* we held that convictions for second-degree burglary and conspiracy to commit second-degree burglary, taken together with six prior felonies including robbery and sale of

narcotic drugs, met the requisite requirement of gravity or seriousness to support a life sentence. Similarly, in *Drake* we held that the crime of accessory to first-degree murder, considered against a background of three prior felony convictions, was sufficiently serious to support a life sentence. In *Alvarez* we reached that same conclusion based on convictions of aggravated robbery, robbery, theft, and conspiracy to commit aggravated robbery and theft, coupled with prior convictions for second-degree burglary, criminal attempt to commit theft, first-degree criminal trespass, and criminal attempt to commit second-degree burglary. In view of the obvious gravity of the offenses for which the defendants were convicted in these cases, taken together with the number and seriousness of the charges on which the habitual criminal status of each defendant was based, we did not find it necessary to pursue a more refined or detailed analysis. In an abbreviated fashion, we could arrive at the conclusion that a life sentence, with eligibility for parole after twenty or forty years, was consistent with the constitutional prohibitions of cruel and unusual punishments.

Courts in other jurisdictions also conduct an abbreviated proportionality review when grave or serious crimes make up the basis for the imposition of an enhanced sentence under a habitual criminal statute. *See McLester v. State*, 460 So. 2d 870, 873 (Ala. Cr. App. 1984) (declining to apply extended *Solem* proportionality review where "triggering offense" consists of a serious, "life-endangering" crime); *Minor v. State*, 546 A.2d 1028, 1032-33 (Md. 1988) (abbreviated proportionality review following third conviction for a crime of violence); *State v. Housden*, 399 S.E.2d 882, 884-86 (W. Va. 1990) (abbreviated proportionality review where offenses involve actual or threatened violence to the person); *cf. Moore v. State*, 515 N.E.2d 1099, 1105 (Ind. 1987) (abbreviated proportionality review under state constitution given a criminal history of violent, non-property crimes). Some federal courts follow a similar pattern and conduct an abbreviated proportionality review in serious drug offense cases. *See United States v. Mendes*,

912 F.2d 434, 440-41 (10th Cir. 1990) (abbreviated proportionality review following sentence to term of years for felony drug conviction); *United States v. Rhodes*, 779 F.2d 1019 (4th Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986) (abbreviated proportionality review following lengthy sentences without possibility of parole based on convictions for possession of a large amount of illegal drugs).

V.

In the absence of a need for a refined analysis inquiring into the details of the specific offenses or a detailed comparison of sentences imposed for other crimes in this or other jurisdictions, an appellate court is as well positioned as a trial court to conduct a proportionality review. In such circumstances, there is no need or justification for remand. *Alvarez, Drake*, and *Hernandez* illustrate such a situation. We rejected the contention in *Alvarez* that the review must be conducted by the trial court rather than an appellate tribunal because we determined that a refined analysis requiring inquiry into specific facts not available on the appellate record was unnecessary.

In less clear cases, however, a court may need to examine the facts underlying the offenses in question in order to assess the harm caused or threatened to the victim or society and the culpability of the offender. This may be the only way a court could conduct a meaningful proportionality review. The proportionality review may require factual findings concerning the crime, the level of violence, and the other factors *Solem* identified in evaluating the severity of the crimes in question. As the Colorado Court of Appeals held in *People v. Austin*, 799 P.2d 408, 413 (Colo. App. 1990):

> the trial court is in a better position than the appellate court to receive evidence and to conduct the

> proportionality review in the first instance subject to review on appeal. This is not to say that such review cannot be conducted at the appellate level if, as in *People v. Drake, supra*, the seriousness of the present crime is the focus of the review, or if the focal point is the seriousness of the present crime and the predicate offenses as in *People v. Hernandez, supra.*

Although the ability of an appellate court to conduct a proportionality review is somewhat dependent on the character and extensiveness of the information in the record, factual inquiries are best suited to performance by a trial court. In deciding whether to remand, therefore, an appellate court should first consider the inherent gravity of the offenses and determine whether an abbreviated proportionality review is appropriate. If it is not, the court should then assess the information available in the record and determine whether the parties wish to adduce additional evidence relevant to constitutional proportionality. If the appellate court determines that additional evidence is necessary or desirable, the court should remand for an initial proportionality review by the trial court. These determinations necessarily cannot be made with litmus test certainty, and an appellate court should be accorded a generous degree of discretion in making the decision whether to remand.[13]

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[13]The trial court, in turn, should have discretion to control the character and scope of the evidence that is presented concerning constitutional proportionality. The trial court is in the best position to evaluate, as the hearing progresses, the extensiveness of the factual inquiries necessary to make a fully informed and legally sound proportionality determination. In some cases, for instance, it may be necessary that the trial court review part or all

With the foregoing principles in mind, we now address whether the court of appeals abused its discretion in remanding the present case to the district court to conduct a proportionality review.

VI.

The court of appeals remanded this case to the trial court based on its observation "that the trial court is in a better position than the appellate court to conduct the proportionality review. ... particularly ... when the focus [is] on the defendant's record in its entirety, rather than upon the seriousness of the present offense." *Gaskins*, slip op. at 4. We agree that in the present case the nature and character of the crimes at issue support the court of appeals' exercise of discretion in returning the case to the trial court for the development of a factual record. None of the underlying crimes are intrinsically so grave or serious that the court of appeals can be held to have abused its discretion in remanding the case to a forum better adapted for development of the facts and circumstances surrounding the crimes.[14] On their faces, the

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of the record of a trial in order to evaluate the seriousness of a prior offense. In others, a record of a providency hearing, a presentence investigation report, or other abbreviated summary of the facts underlying the conviction may provide adequate, reliable information for the purpose of proportionality review. The court, with the assistance of the parties, may devise other ways of obtaining the necessary information. The trial court should exercise its discretion to control evidentiary presentations to serve the dual goals of obtaining adequate information to assure an informed decision and conserving judicial resources by curtailing presentation of unnecessarily extensive evidence.

[14]*Solem* also anticipates an examination of the underlying facts of the crimes in question. 463 U.S. at 296-97.

crime of attempt to commit theft, for which Gaskins was sentenced, and the crimes of second-degree assault, attempt to commit criminal trespass, and theft, upon which his habitual criminal adjudication was based, are of a lesser degree of gravity than the multiple offenses including burglary, robbery, and sale of narcotic drugs in *Alvarez* and *Hernandez*, and do not approach the magnitude of the accessory to first-degree murder crime involved in *Drake*. The statutory elements of the crimes underlying Gaskins' sentence encompass a broad range of conduct. The court of appeals properly could determine that development of further facts concerning the circumstances of Gaskins' offenses[15] and possibly a comparison of sentences imposed for like crimes in this and other jurisdictions would be necessary for a full and fair evaluation of the defendant's constitutional challenges to his life sentence.[16]

VII.

We continue to adhere to the principle that the prohibition of "cruel and unusual punishments" found in the Eighth Amendment to the United States Constitution and in article II, section 20, of the Colorado Constitution, necessitates a

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[15]A sketch of the circumstances of the two prior offenses to which Gaskins pleaded guilty was available to the court of appeals in records of the providency hearings in which those circumstances are outlined in setting forth the factual bases for the pleas. The circumstances of the crime for which the defendant was sentenced were available in the record of the trial.

[16]We should not be understood to hold that it would have been an abuse of discretion for the court of appeals to resolve the proportionality issue without remanding. That issue is not before us. We simply determine that the order of remand was within the broad discretion accorded to the court of appeals in matters of this kind.

proportionality review of a life sentence imposed pursuant to the Colorado habitual criminal statute. In cases where the severity of the crime is compelling and there is a possibility of parole, the appellate court may conduct an abbreviated review. In other cases the appellate court should exercise discretion under the guidelines enunciated in this opinion in deciding whether to conduct the more extended proportionality review itself or remand to the trial court for that purpose. In the present case, the court of appeals acted within its discretion in remanding the case to the trial court to conduct a proportionality review.

Judgment affirmed.

APPENDIX C

SUPREME COURT, STATE OF COLORADO
CASE NO. 90SC437
CERTIORARI TO THE COLORADO COURT OF APPEALS,
88CA0159

ORDER OF COURT

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

vs.

JOHN HARVEY GASKINS,

Respondent.

Upon consideration of the Petition for Rehearing filed in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that said Petition for Rehearing shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, FEBRUARY 3, 1992.

cc: Robert Mark Russel
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